IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-594

INDIANA-KENTUCKY ELECTRIC CORPORATION,
INDIANA & MICHIGAN ELECTRIC COMPANY,
INDIANA STATEWIDE RURAL ELECTRIC COOPERATIVE, INC.,
INDIANAPOLIS POWER & LIGHT COMPANY,
NORTHERN INDIANA PUBLIC SERVICE COMPANY,
PUBLIC SERVICE COMPANY OF INDIANA, INC., AND
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
SIERRA CLUB,
METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR,
NEW MEXICO CITIZENS FOR CLEAN AIR AND WATER, AND
STEVEN WINTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

TABLE OF AUTHORITIES

Cases

United States Statutes

Congressional Authority

The Federal Register

Miscellaneous

IN THE

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No.

INDIANA-KENTUCKY ELECTRIC CORPORATION, ET AL.,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This petition is filed on behalf of seven electric utility companies which own, operate, and from time to time construct or modify coal-fired steam electric generating stations in the State of Indiana. The petitioning utilities are: Indiana-Kentucky Electric Corporation, Indiana & Michigan Electric Company, Indiana Statewide Rural Electric Cooperative, Inc., Indianapolis Power & Light Company, Northern Indiana Public Service Company, Public Service Company of Indiana, Inc., and Southern Indiana Gas and Electric Company.

Respondents are the U. S. Environmental Protection Agency which issued the regulations reviewed below, Sierra Club, Metropolitan Washington Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, and Steven Winter. The latter four parties intervened below as petitioners for review of the regulations.

The petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above cause on August 2, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit has not yet been officially reported, but is unofficially reported at 9 ERC 1129, and is included herein at Appendix I.

The order of the Court of Appeals for the Seventh Circuit transferring petitioners' review proceeding is not reported, but is set forth in Appendix I at A53-A54.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1976, and is set forth at Appendix I, A47-A52. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether State implementation plans which meet the eight criteria of Clean Air Act Section 110(a)(2) are also required by the Clean Air Act to prohibit significant deterioration of air quality.

2. Assuming plans must prohibit significant deterioration, whether the Environmental Protection Agency may, under Clean Air Act Sections 110(c) and 110(d), promulgate identical regulations revising all 55 implementation plans without according the States the opportunity to develop their own plan revisions and without public hearings within the States.

A subsidiary question is whether petitioner Indiana electric utilities are entitled to have revisions to the Indiana implementation plan so dictated reviewed by the Court of Appeals for the Seventh Circuit as provided by Section 307(b)(1) of the Clean Air Act.

STATUTE AND REGULATIONS INVOLVED

The provisions of the Clean Air Act Amendments of 1970, 42 U. S. C. §§ 1857 *et seq.*, primarily involved are set forth in Appendix II hereto.

The regulations under review, 40 C. F. R. §§ 52.01(d),(f) and 52.21 (1975), *as amended*, were promulgated by the U. S. Environmental Protection Agency as amendments to all state implementation plans under the Clean Air Act. They were published in the Federal Register, together with an explanatory preamble, on December 5, 1974 (39 F. R. 42509), and were revised on January 16, 1975 (40 F. R. 2802), June 12, 1975 (40 F. R. 25004) and September 10, 1975 (40 F. R. 42011). The regulations thus promulgated are set forth as Appendix III hereto.

STATEMENT OF THE CASE.

This case follows in the wake of the Court's four-to-four division three years ago in *Fri* v. *Sierra Club*.[1] The inconclusiveness of the Court's action there left in force a district court order which had been affirmed without opinion by the

1. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by equally divided Court, sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973). Petitioners were not parties to that litigation.

Court of Appeals for the District of Columbia Circuit. Pursuant to that order, the Administrator of the Environmental Protection Agency (EPA) determined that the implementation plans of every State, including Indiana, were defective to the extent they failed to prohibit "significant deterioration" of air quality in areas where the air was less polluted than allowed by national ambient air quality standards promulgated under the Act.[2]

After proposing several alternative plans for preventing significant deterioration[3] and holding public hearings at five sites[4] across the country—none in Indiana—EPA promulgated final regulations at 39 Fed. Reg. 42509 *et seq.* (Dec. 5, 1974). The regulations were incorporated as revisions into the implementation plans of every State, despite the lack of public hearings within Indiana or nine-tenths of the States and without regard to the prior content of the implementation plans affected.[5]

Petitioners sought to have the regulations affecting Indiana reviewed by the Court of Appeals for the Seventh Circuit as required by Clean Air Act Section 307(b)(1).[6] Over their objection, that review proceeding was transferred to the Court of Appeals for the District of Columbia Circuit and consolidated with thirteen other petitions for review filed in the various judicial circuits. On August 2, 1976, a panel of the District of Columbia Circuit rendered its decision upholding the regulations in every respect.

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2. 37 Fed. Reg. 23836-37 (Nov. 9, 1972). The order cautioned that some of the plans thus disapproved might later prove to have prevented "significant deterioration" all along, depending upon the definition of the phrase—a definition EPA indicated it would make up in later rulemaking.

3. 38 Fed. Reg. 18986 *et seq.* (July 16, 1973); 39 Fed. Reg. 31000 (Aug. 27, 1974).

4. Hearings were in Atlanta, Dallas, Denver, San Francisco and Washington, D. C., 39 Fed. Reg. 31000 (Aug. 27, 1974).

5. 40 C. F. R. 52.21(a); clarifying amendments were promulgated at 40 Fed. Reg. 2802 (Jan. 16, 1975); 40 Fed. Reg. 25004 (June 12, 1975); and 40 Fed. Reg. 42011 (Sept. 10, 1975).

6. 42 U. S. C. § 1857h-5(b)(1).

The Regulations

The significant deterioration regulations apply to all areas of the country where concentrations of sulfur dioxide or particulate matter are less than allowed by the national secondary ambient air quality standards established for those pollutants under Section 109(b) of the Act.[7] For such areas, the regulations impose a classification scheme which strictly limits increases in ambient pollutant concentrations to be allowed as a result of economic growth. In Class I areas, "practically any" increase in ambient levels of the two pollutants, and thus practically any economic growth, is prohibited.[8] In Class II areas, somewhat larger increases in the levels of those pollutants are allowed, so that what EPA deems "moderate well-controlled growth" is possible. In Class III areas, pollutant levels may reach the national standards.[9] Thus, an increase in ambient pollutant concentration which exceeds the allowable increment for an area constitutes "significant deterioration" of air quality in the area.

All clean air areas are initially designated Class II.[10] The regulations set forth procedures by which, subject to numerous conditions a State may propose, and EPA may approve, redesignation of an area to another Class. Among the prerequisites is a determination by EPA of the adequacy of the State's consideration of the following factors:

> . . . the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.[11]

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7. 42 U. S. C. § 1857c-4(b).
8. 39 Fed. Reg. 42510 (Dec. 5, 1974).
9. *Id.*
10. 40 C. F. R. § 52.21(c)(3).
11. 40 C. F. R. § 52.21(c)(3)(ii)(*d*).

Preconstruction review is the primary means of preventing breach of the allowable increments for an area. It is required for nineteen specified types of stationary sources of sulfur oxides or particulate matter,[12] and requires a determination by EPA (or a State authorized to perform the function) that emissions from the new source, together with emissions from all other sources (commercial, residential, industrial), will not violate the significant deterioration increments applicable to that area, or "any other area."[13] By referring to the effects of increments upon "any other area," the regulations thus impose a "shadow effects" rule that extends a zone's increment ceilings far beyond the boundaries of the zone itself. For most areas of the Nation, for example, EPA has suggested that a Class I inhibition could stretch 60 to 100 miles into a neighboring Class II or III area. 39 Fed. Reg. 42513 (Dec. 5, 1974). In addition, any such source is required to meet an emission limit, to be specified by the Administrator, which would result from application of the "best available control technology" for sulfur dioxide and particulate matter. 40 C. F. R. § 52.21(d)(2)(ii).

REASON FOR GRANTING THE WRIT

The Decision Below Decided Important Questions of Federal Law Which Should Be Expressly Settled by This Court.

The First Question—Is Section 110(a)(2) the Measure for State Implementation Plans?

The first question presented by this petition—whether the Clean Air Act requires that implementation plans prevent significant deterioration—was determined to be in need of settlement by this Court nearly four years ago when certiorari was granted in *Ruckelshaus* v. *Sierra Club*, 409 U. S. 1124 (1973). However, with only eight members participating, the Court was unable to decide the question, and the lower court's

12. 40 C. F. R. § 52.21(d).
13. 40 C. F. R. § 52.21(d)(2)(i).

opinion was affirmed *ex necessitate* by an equally divided Court *sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

The question is no less important today and should be settled by this Court.

The regulations at issue in fact place under several new levels of political and administrative control the economic development of the vast bulk of the land in the United States. Estimates vary as to the proportion of the country subject to the regulations. Petitioners' home state of Indiana, however, provides a quite conservative illustration, for only twelve states occupy less land,[14] but in terms of dollar value added by manufacturing, Indiana is the tenth most industrialized state.[15] The State, thus, has a relatively large number of pollution sources situated in a relatively small land area. EPA's recent action on Indiana's revised implementation plan strategy for sulfur dioxide approved classification of 85 of its 92 counties (or roughly 92% of its area) as having ambient sulfur dioxide levels less than allowed by the national secondary standards.[16] Thus, the decision below has subjected to Federal control the economic development and land use planning of over 90% of the land mass of this highly industrialized State.

The U. S. House of Representatives recently passed a bill which, if enacted as an amendment to the Clean Air Act, would have established a classification scheme identical to the one imposed by the regulations at hand, as shown by the following description:

> Initially most areas which are cleaner than the national ambient air quality standards with respect to any pollutant would be classified as Class II . . . Areas where air quality is worse than those minimum Federal standards would not be classified at all and would not be affected by this section

14. *U. S. Bureau of the Census, Statistical Abstract of the United States, 1975 (96th ed.)* Washington, D. C., 1975, at 176.

15. *Id.*, 749.

16. 41 Fed. Reg. 35676-77 (Aug. 24, 1976).

> since the goal in these areas is to attain and maintain the minimum Federal ambient standards.[17]

The committee report gave the following estimate of the proportion of the country subject to the bill's significant deterioration provisions:

> First, it must be re-emphasized that more than 98% of the country is initially designated Class II.[18]

Thus, the question whether the Clean Air Act requires state plans to contain non-degradation provisions may fairly be viewed as the question whether land use planning of more than 90% of the United States is subject to Federal administrative control.

The overriding importance of this question is self-evident.

Since dividing equally on the question of significant deterioration in *Fri* v. *Sierra Club*,[19] the Court has interpreted the Clean Air Act three times: *Union Electric Co.* v. *EPA*, ... U. S. ....., 44 U. S. L. W. 5060 (June 25, 1976); *Hancock* v. *Train*, ... U. S. ....., 44 U. S. L. W. 4767 (June 7, 1976); *Train* v. *Natural Resources Defense Council*, 421 U. S. 60 (1975).

The holdings in *Union Electric* and *Train* v. *NRDC* appear irreconcilable with the decision below. The Court held in *Union Electric* that EPA may not disapprove a State implementation plan on the basis of factors not among the eight criteria listed in Section 110(a)(2):[20]

> This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the

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17. *House Comm. on Interstate and Foreign Commerce, Clean Air Act Amendments of 1976, H. R. Rep. No. 94-1175*, 94th Cong., 2d Sess. 120 (1976).

18. *Id.*, 149.

19. 412 U. S. 541 (1973).

20. 42 U. S. C. 1857c-5(a)(2).

> Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC*, 421 U. S. at 71 n.11, 79, and none of the eight factors appears to permit consideration of technological or economic infeasibility. Nonetheless, if a basis is to be found for allowing the Administrator to consider such claims, it must be among the eight criteria, and so it is here that the argument is focused.[21]

The major premise of the decision below, however, is precisely contrary to the quoted language and to the holding of *Union Electric*. That premise is that EPA shall *not* approve any implementation plan except upon determining that it meets a ninth criterion, implementation of a "Judicially-created requirement of nondeterioration" (App. I, A15).

While it appears that *Union Electric* should have controlled the proceeding below, the Court of Appeals avoided it on the argument that the precise issue of significant deterioration was not before this Court in that case(App. I, A24). This raises a question of Federal law, the extreme importance of which is belied by the obviousness of its answer: When Congress has written a statute which says EPA shall approve implementation plans which meet eight specified criteria, and the Supreme Court has construed the statute to mean that EPA shall approve, and cannot disapprove, implementation plans which meet the same eight criteria, should an additional criterion be added by judicial legislation and made the basis for disapproving State plans?

In *Train* v. *Natural Resources Defense Council*, 421 U. S. 60 (1975), the Court held that under Section 110(a)(3) of the Clean Air Act, EPA is required to "approve any revision of a state implementation plan," including the grant of variances to individual pollution sources, so long as the revision leaves the plan in conformity with the eight criteria in Section 110(a)(2)

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21. *Union Electric Co.* v. *EPA*, *supra*, 44 U. S. L. W. at 5063 (footnote omitted).

and is adopted after public notice and hearing. 421 U. S. 60, at 80, 99. The decision below concedes that significant deterioraton is not expressly included in Section 110 (App. I, A39), but flatly contradicts the holding of *Train* on the basis that this Court's language does not mean what it says (App. I, A23-A24). It approves EPA-imposed regulations which effectively prohibit the States from revising their plans or granting variances to accommodate new or modified sources in areas where national ambient air quality standards are met unless a host of new Federal requirements having no relation to Section 110(a)(2) are met.

The holding in *Train* was based upon the Court's analysis of the necessary characteristics of an implementation plan and the State-Federal division of responsibility for devising and revising the terms of a plan. That analysis is as follows:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.[22]

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22. 421 U. S. 60, 79 (1975), (footnote omitted; emphasis in original).

The decision below conflicts with the scheme set forth in this passage in the following respects:

1. It upholds EPA's promulgation of emission limitations and source review procedures which apply precisely and only where *not* necessary to meet national standards.

2. It upholds EPA action devising and promulgating a specific plan of its own for 55 States, districts and territories on grounds other than incongruence of their plans with Section 110(a)(2).

The Second Question—The Procedure for EPA's Revision of State Implementation Plans.

The second question presented by this petition is whether under Sections 110(c) and 110(d)[23] EPA may usurp the right of the States to develop their own implementation plans by promulgating requirements that plans prevent significant deterioration and on the same day imposing revisions of all 55 plans to satisfy the newly-defined requirements, all without hearings within the States.

In addition to the conflicts with the *Train* decision set forth above, the decision of the Court of Appeals, in upholding the procedure followed by EPA, is in further conflict with *Train*, as follows:

1. It upholds EPA's assumption of a primary, instead of a secondary, role in devising specific emission limitations for major sources in over 90% of the country.

2. It upholds EPA action devising and promulgating its own plans for 55 states, districts and territories without observing the procedures of Section 110(c), which the Court cited as applicable.

This question goes to the very heart of what an implementation plan is, how an implementation plan comes into being, and how one may be enforced. The statutory definition is in Section 110(d):

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23. 42 U. S. C. §§ 1857c-5(c) and 1857c-5(d), respectively.

> For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

This is a definition of fundamental importance to the functioning of the statutory scheme because according to Section 113, with minor exceptions, EPA is without power under the Clean Air Act to enforce anything but an "applicable implementation plan."[24] It is clear that the regulations at issue do not "implement[ ] a national primary or secondary ambient air quality standard . . ." and were not "approved under subsection (a)" of Section 110. It is obvious also that the regulations were not "promulgated under subsection (c)" of Section 110. That provision restricts EPA's authority to propose and promulgate revisions of State plans to three distinct circumstances: (1) a State's failure to submit a plan to implement a primary or secondary standard by the statutory deadline; (2) nonconformity of a plan with the requirements of Section 110; (3) a State's failure to revise a plan within 60 days of EPA's notice that the plan should be revised to achieve new primary or secondary standards or should achieve standards more quickly. None of these circumstances was the basis of the December, 1974, regulations, as the opinion below acknowledges (App. I, A38-A39).

Section 110(c) also requires that a State have the opportunity to cure its plan of any deficiencies EPA determines to exist, failing which EPA must hold public hearings within the State before promulgating any EPA-proposed revision of its plan. Here no State had the opportunity because contempo-

24. Clean Air Act, Section 113, 42 U. S. C. § 1857c-8. EPA can also enforce new source performance standards under Section 111, 42 U. S. C. § 1857c-6; emission standards under Section 112, 42 U. S. C. § 1857c-7; the inspection and reporting provisions of Section 114, 42 U. S. C. § 1857c-9; and the energy-related authorities of Section 119, 42 U. S. C. § 1857c-10.

raneously with promulgating the definition of significant deterioration, EPA issued its disapproval of all plans for failing to prevent significant deterioration. On the same day it revised each plan with curative regulations, thereby violating Section 110(c) by not holding public hearings in 46 of the affected States.[25]

The significant deterioration regulations then raise a distinct problem: Of the four attributes which define a regulatory provision as part of an applicable implementation plan, the regulations possess not one. The Supreme Court has explicitly noted that the characteristics set forth in Section 110(d), and particularly the characteristic of implementing national standards, are essential to the identity of an implementation plan:

> An exception which *does* jeopardize national standards, on the other hand, cannot be a revision because it would deprive the revised plan of a characteristic without which it cannot under the Act be an applicable plan. See § 110(d) which defines "applicable implementation plan" as the "implementation plan, or most recent revision thereof, which has been approved under [§ 110(a)(2)]. . . ."[26]

Thus, the question is whether an implementation plan is what it appears to the naked eye to be, or whether the gloss of legislative history actually operates to contradict the Supreme Court and to amend Section 110(d) to read:

> For the purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a), or promulgated under subsection (c) *or promulgated under the authority implicit in Section 101(b)(1) pursuant to such procedure as the Administrator shall employ* and which implements a national primary or secondary ambient air quality standard in a State *or which implements a prohibition against the significant deterioration of air quality in areas of a State where primary and secondary ambient air quality standards are met.*

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25. 39 Fed. Reg. 42509 *et seq.* (Dec. 5, 1974).

26. *Train* v. *Natural Resources Defense Council*, 421 U. S. 60, 90 n.25 (1975) (emphasis in original).

Whether such a fundamental rewriting of the Clean Air Act should be allowed to stand is an important question of Federal law which should be settled by this Court.

Judicial review of the significant deterioration regulations has also been at odds with the statutory scheme and has contributed to EPA's usurpation of the function of the States. The judicial review provision of the Clean Air Act reads in pertinent part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B) or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.[27]

Petitioners contend, as they have since originally filing their petition for review in the Seventh Circuit, that the obvious meaning of this provision is that review of EPA action on a State implementation plan be performed "only" by the Court of Appeals for the Circuit in which the affected State lies. This is consonant with the repeated injunction in Section 110 that implementation plans may not be adopted or revised without a public hearing within the State, and that each plan is to be reviewed separately by EPA. It is consistent also with the congressional finding in Section 101(a)(3),[28] and direction in Section 107(a),[29] that air pollution control is the primary responsibility of the States and local governments. In the proceeding below Petitioners made substantial claims that, prior to EPA's disapproving and revising it, the Indiana implementation plan contained measures to prevent degradation of the State's clean air, and that differences between Indiana's plan and the one EPA devised for the purpose were not legal grounds for

27. Section 307(b)(1), 42 U. S. C. § 1857h-5(b)(1).
28. 42 U. S. C. § 1857(a)(3).
29. 42 U. S. C. § 1857c-2.

disapproving the State's plan. The court below, faced with arguments as to most of the plans in the Nation, did not review those claims. Petitioners submit that avoidance of such inadequate judicial review is only one of several reasons why the statutory phrase "appropriate circuit" should not be construed to mean that every petitioner for review should have to guess which circuit is the most appropriate, *Dayton Power & Light Co.* v. *EPA*, 520 F. 2d 703 (6th Cir. 1975) notwithstanding.

CONCLUSION

The decision below is in conflict with applicable decisions of this Court and, if allowed to stand, will have worked a major restructuring of State-Federal relationships and will have effectively rewritten a major piece of Federal legislation.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

SIERRA CLUB,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents

THE DAYTON POWER & LIGHT CO. ET AL.,

Intervenors

No. 74-2079

SIERRA CLUB ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,

Petitioners

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

UTAH POWER & LIGHT COMPANY,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO ENVIRONMENTAL IMPROVEMENT AGENCY,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY,
SIERRA CLUB ET AL.,

Intervenors

No. 75-1372

UTAH INTERNATIONAL, INC.,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL.,
Petitioners

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

SIERRA CLUB ET AL.,
Intervenors

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY ET AL.,
Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

SIERRA CLUB ET AL.,
Intervenors

No. 75-1664

BUCKEYE POWER, INC. ET AL.,
Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
Respondents

SIERRA CLUB ET AL.,
Intervenors

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL.,
Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

SIERRA CLUB ET AL.,
Intervenors

No. 75-1666

ALABAMA POWER COMPANY ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1763

MONTANA POWER COMPANY ET AL.,

Petitioners

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents

SIERRA CLUB ET AL.,

Intervenors

Petitions for Review of Regulations Promulgated by the Environmental Protection Agency

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Argued June 9, 1976
Decided August 2, 1976

Before WRIGHT, ROBINSON, and WILKEY, *Circuit Judges*.
Opinion for the court filed by *Circuit Judge* WRIGHT.
WRIGHT, *Circuit Judge*:

INTRODUCTION

One of the primary purposes of the Clean Air Act, 42 U. S. C. § 1857 *et seq.* (1970), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * *." Section 101(b)(1), 42 U. S. C. § 1857(b)(1). Pursuant to the court order in *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D. C. 1972), *aff'd per curiam*, 4 ERC 1815 (D. C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973), the Administrator of the Environmental Protection Agency (EPA) promulgated regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already is cleaner than the national ambient air quality standards.[1] The regulations employ a classification

1. The twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already, as in this case, is cleaner than national standards. *See* Part V-A of this opinion *infra*. Accomplishment of those objectives is to be a joint enterprise of the federal government and the states, the former providing informed guidance to the implementation efforts of the latter. *See* §§ 101(a)(3), (4) of the Act, 42 U. S. C. §§ 1857(a)(3), (4).

Section 108 of the Act, 42 U. S. C. § 1857c-3, required the Administrator of EPA to publish a list of air pollutants which have "an adverse effect on public health or welfare." The Administrator was then to promulgate national primary and secondary ambient air quality standards for those specified pollutants. National *primary* air quality standards are those "the attainment and maintenance of which * * * are requisite to protect the public health"; national *secondary* standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109, 42 U. S. C. § 1857c-4. The Administrator has promulgated national primary and secondary air quality standards for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C. F. R. §§ 50.4-50.11 (1975).

The states are charged with the duty to develop implementation plans designed to achieve the level of air quality prescribed by the national primary and secondary standards:

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scheme under which these "clean air" regions may be designated Class I, II, or III. All such areas initially are designated Class II, under which specified increments in sulfur dioxide and particulate matter pollution are considered "insignificant." A state, Indian territory, or federal land may be redesignated after

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> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising maintained within each air quality control region in such State. which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 107, 42 U. S. C. § 1857c-2. The plans are submitted to the Administrator for approval under the provisions of § 110 of the Act, 42 U. S. C. § 1857c-5 (1970), *as amended* (Supp. IV 1974). A proposed implementation plan must satisfy the requirements of § 110(a)(2)(A)-(H), 42 U. S. C. § 1857c-5(a)(2)(A)-(H), which requirements include attainment of the national primary standards within three years after approval of the plan, and attainment of the secondary standards within a "reasonable time." Section 110(a)(2)(A), 42 U. S. C. § 1857c-5(a)(2)(A).

Section 110 also provides that the Administrator is promptly to prepare and publish his own regulations for a state if (a) it fails to submit a plan, (b) the plan "is determined by the Administrator not to be in accordance with the requirements of this section," or (c) the state fails to revise its plan pursuant to a provision required by § 110(a)(2)(H). Section 110(c)(1), 42 U. S. C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) of § 110 also contains a conditional hearing requirement for these "replacement" implementation plans: "If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." Subsection (a)(2)(H) requires that an implementation plan provide for revision (i) to take account of changes in either technology or the national standards and (ii) whenever the Administrator determines that the plan is inadequate to achieve the primary or secondary standards.

The basic structure described above is supplemented by § 111 of the Act, 42 U. S. C. § 1857c-6 (1970), *as amended* (Supp. IV 1974), which provides for promulgation of "standards of performance" for emission limitations of significant new sources of pollution, by categories of sources. The standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

hearing and by application to EPA. Designation as Class I implies a region of very clean air, in which relatively small increments in air pollution would be considered significant deterioration; Class III areas are those in which deterioration of air quality to the national ambient air quality standards would be considered insignificant.

The court has heard the regulations attacked from several perspectives. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent significant deterioration of existing clean air. The States of New Mexico, Wyoming, and California[2] agree in some respects with Sierra Club, but are concerned that the regulations infringe on the general regulatory authority vested in the states by the Clean Air Act. A large number of electric power companies and industrial organizations have argued that the regulations are not authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure created by the regulations is unconstitutional.

We conclude that the Administrator's action is rationally based and has not been shown to be either without his authority or unconstitutional. We therefore do not disturb the regulations as promulgated.

II. Litigation History

Suit was filed in May 1972 by the Sierra Club and other environmental protection groups for a declaratory judgment that the Clean Air Act prohibited approval of state implementation plans which permitted significant deterioration of air cleaner than the national secondary standards, and for injunctive relief to prevent the Administrator from approving those portions of state implementation plans which would permit significant deterioration. District Judge John H. Pratt granted plaintiffs' motion for a

2. The three named states are joined by Maine, Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida.

preliminary injunction and declared invalid an EPA regulation[3] which had required only that state implementation plans "be adequate to prevent * * * ambient pollution levels from exceeding * * * [the applicable] secondary standard." *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D. C. 1972). The Administrator was enjoined from approving any state plan "unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator."[4]

As is apparent from the provisions of the Clean Air Act outlined above,[5] prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act. Judge Pratt based his decision, rather, on the "protect and enhance" language of Section 101(b)(1) of the Act and on the legislative history of both the Clean Air Act of 1970 and the Air Quality Act of 1967.[6] The decision was affirmed *per curiam* by this court, 4 E. R. C. 1815 (1972), and was affirmed by an equally divided Supreme Court, *sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

Pursuant to that order, the Administrator reviewed and disapproved all state plans insofar as they failed to provide for prevention of significant deterioration. 37 Fed. Reg. 22836 (November 9, 1971). Four alternative sets of regulations were proposed for public comment, in an effort to determine what meaning to give the concept of "significant deterioration."[7] Final regulations

3. 40 C. F. R. § 51.12(b) (1975).

4. *Sierra Club* v. *Ruckelshaus*, Civil Action No. 1031-72 (D. D. C. May 30, 1972), JA Vol. IV at 1487.

5. *See* note 1 *supra*.

6. The legislative history is discussed at notes 32-38 *infra*.

7. 38 Fed. Reg. 18986 (July 16, 1973). In proposing alternative solutions, EPA posed for public debate the problem of how significant deterioration was to be defined:

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were published December 5, 1974, 39 Fed. Reg. 42509, and were amended slightly on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

III. The Regulations

In promulgating final regulations[8] EPA was concerned primarily with the meaning of "significant deterioration." As it stated in the discussion preceding the new regulations:

> Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth

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> The basis for preventing significant deterioration * * * lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formulation of national ambient air quality scientific data on the kind and extent of adverse effects of air pollution levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare.
>
> * * * * *
>
> The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of deterioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Id. at 18987, 18988.

8. "Prevention of Significant Air Quality Deterioration," 39 Fed. Reg. 42510 (Dec. 5, 1974).

> occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

39 Fed. Reg. at 42520. The solution was to prescribe, for those areas with air cleaner than the national standards, three classes of allowable total increments above the levels of particulate matter and sulfur dioxide pollution as of January 1, 1975, with the intention that each area could determine which class would prevent significant deterioration of its air in light of the area's air quality and social and economic needs and objectives:

> Class I applie[s] to areas in which practically any change in air quality would be considered significant; Class II applie[s] to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applie[s] to those areas in which deterioration up to the national standards would be considered insignificant.
>
> * * * * *
>
> Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Id. The regulations, 40 C. F. R. §§ 52.01(d), (f), and 52.21 (1975), were promulgated as amendments to the disapproved state implementation plans.[9]

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9. Part 52 of 40 C. F. R. "sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof." 40 C. F. R. § 52.02(a) (1975). Each state implementation plan has been amended to incorporate by reference the new regulations. *See, e.g.*, 40 C. F. R. §§ 52.96 (Alaska), 52.144 (Arizona), 52.181 (Arkansas).

All areas initially are designated Class II,[10] and may be redesignated by proposal of a state, federal land manager, or Indian governing body where the state has not assumed jurisdiction over Indian lands.[11] Federal land may be designated only to a more restrictive classification than that provided by the state(s) in which it is located.[12]

A state may redesignate if a hearing is held after notice to states, federal land managers, and Indian governing bodies that may be affected,[13] and if the proposed redesignation is based on the record of the hearing,

> which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the areas being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.[14]

A redesignation is to be approved if the state has complied with the listed requirements, has not "arbitrarily and capriciously disregarded" the considerations listed in the passage quoted above, and has undertaken the new source review requirements of Sections 52.21(d) and (e), discussed below.[15] 40 C. F. R. § 52.21(c)(3)(vi)(*a*) (1975).[16] Federal land managers and

10. 40 C. F. R. § 52.21(c)(3)(i) (1975).
11. 40 C. F. R. §§ 52.21(c)(3)(ii), (iii), (iv), (v) (1975).
12. 40 C. F. R. § 52.21(c)(iv) (1975).
13. 40 C. F. R. §§ 52.21(c)(3)(ii)(*a*)-(*c*) (1975).
14. 40 C. F. R. § 52.21(c)(3)(ii)(*d*) (1975).
15. *See* discussion at notes 20-23 *infra*.
16. In the event of a protest by a state or Indian governing body to a redesignation proposed by another state, federal land manager, or Indian governing body, the Administrator may approve the proposal "only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignations upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests." 40 C. F. R. § 52.21(c)(3)(vi)(*e*) (1975).

Indian governing bodies are subject to requirements parallel to those imposed on the states, with the added requirement that they consult with the state(s) in which they are located.[17]

If an area is designated as Class I or II, the allowable incremental pollution is measured from January 1, 1975.[18] No increments are specified for Class III; areas so designated are required to meet only the national secondary standards.[19]

Enforcement of the limitation on incremental pollution is accomplished partly through preconstruction review of 19 categories of stationary sources considered to be significant sources of pollution.[20] Permission to construct or to modify significantly one of the listed stationary sources is conditioned on a showing that the source's emissions, together with all other increases or decreases in emissions in the area since January 1, 1975, will not violate the air quality increments applicable to *any* area.[21] The source also must meet an emission limit, specified by the Administrator, "which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f),

17. 40 C. F. R. §§ 52.21(c)(3)(iv), (v) (1975).

18. 40 C. F. R. § 52.21(c)(2)(i) (1975). The increments are prescribed in the following table, included in the cited subsection:

Pollutant	Class I (ug/m^3)	Class II
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

19. 40 C. F. R. § 52.21(c)(2)(ii) (1975).

20. 40 C. F. R. § 52.21(d)(1)(i)-(xix) (1975).

21. 40 C. F. R. § 52.21(d)(2)(i) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

for particulate matter and sulfur dioxide."[22] Preconstruction review of new proposed sources will be conducted by the Administrator or, by delegation, by the individual states.[23]

Last, it should be noted that the described classification scheme is no procrustean bed to which all states are to be bound. The states retain the option of proposing an alternative method of preventing significant deterioration of air quality, thereby abandoning the regulatory framework described by the regulations under review, As EPA stated in proposing regulations:

> The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual State Implementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

39 Fed. Reg. at 31000 (August 27, 1974).

IV. Standard of Review

It is well settled that EPA rulemaking is reviewed under Section 10 of the Administrative Procedure Act, 5 U. S. C. § 706(2)(A)-(D) (1970). *Ethyl Corp.* v. *EPA*, ... U. S. App. D. C. ....., ..., ... F. 2d ....., ..., slip op. at 66-74 (No.

22. 40 C. F. R. § 52.21(d)(2)(ii) (1975). "Best available control technology" is defined as equivalent to the new source performance standards promulgated under § 111 of the Clean Air Act, 42 U. S. C. § 1857c-6. *See* discussion at note 1 *supra*. If no standard of performance has been promulgated for a source, best available control technology is determined on a case-by-case basis. 40 C. F. R. § 52.01(f) (1975).

23. 40 C. F. R. § 52.21(f) (1975). *See also* 40 C. F. R. § 52.21(d)(4) (1975), which provides for cooperation between the Administrator and federal land managers for review of new sources on federal land, and between the Administrator and the Secretary of the Interior as to lands over which a state has not assumed jurisdiction.

73-2205, decided March 19, 1976). We must determine whether the Agency's action, findings, and conclusions are invalid as procedurally defective (§ 706(2)(D)), in excess of legislative authority (§ 706(2)(C)), unconstitutional (§ 706(2)(B)), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)).

The "arbitrary and capricious" standard requires that agency action be affirmed if a rational basis exists therefor;[24] it is not for us to inquire into whether the decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency.[25] The Supreme Court has cautioned, with respect to review under the "arbitrary and capricious" standard, that the reviewing court is limited to deciding whether there has been a "clear error of judgment • • •. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 416 (1972). *See Ethyl Corp.* v. *EPA*, *supra*, ... U. S. App. D. C. at .....n.-74, ... F. 2d at .....n.-74, slip op. at 69 n.-74.

We therefore must assure ourselves that the Agency has presented a rational basis for its decision;[26] that it "demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions."[27]

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24. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 290 (1974).

25. *National Ass'n of Food Chains, Inc.* v. *ICC*, ... U. S. App. D. C. ....., ..., ... F. 2d ....., ..., slip op. at 13 (No. 75-1471, decided May 18, 1976) (*per curiam*).

26. We note that the basis of agency action must be provided *by the agency;* an order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding • • •." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943); *see National Ass'n of Food Chains, Inc.* v. *ICC*, *supra* note 25, ... U. S. App. D. C. at ....., ... F. 2d at ....., slip. op. at 12-13.

27. *National Ass'n of Food Chains, Inc.* v. *ICC*, *supra* note 25, ... U. S. App. D. C. at ....., ... F. 2d at ....., slip op. at 14.

V. ARGUMENT

A. Should *Sierra Club* v. *Ruckelshaus* be rejected on further consideration?

The question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards is necessarily the first level of analysis. Although this issue was decided by the earlier *Sierra Club* v. *Ruckelshaus* litigation, it is contended by the industrial petitioners (1) that the decision was clearly wrong on the merits and should be reconsidered, and (2) that the later decision in *Train* v. *NRDC*, 421 U. S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are inconsistent with the prior decision in *Sierra Club* v. *Ruckelshaus*.

The first argument obviously would require the clearest showing that *Sierra Club* v. *Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court. It is posited that neither the "protect and enhance" language of Section 101(b)(1) nor the legislative history of the Clean Air Act need be read to impose a requirement of nondeterioration; petitioners then point out that, to the contrary, a 1970 amendment to the Act, Section 110(a)(2), 42 U. S. C. § 1857c-5(a)(2), states that the Administrator "shall approve" a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard. The conclusion advanced by petitioners is that the judicially-created requirement of nondeterioration violates this plain language of the 1970 amendment.

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress.[28] We

28. *See FTC* v. *Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968): "[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."

find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards. Inasmuch as we find no support for the proposition that the addition of Section 110(a)(2) was intended to limit that policy in any way, we reaffirm our prior holding in *Sierra Club* v. *Ruckleshaus.*

The "protect and enhance" language of the Clean Air Act was added by the Air Quality Act of 1967, 81 STAT. 485.[29] The administrative interpretation and, to a lesser degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration,[30] and that policy appears generally to have been accepted at the time of the addition of the Clean Air Act amendments of 1970.

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29. *Air Quality Act of 1967*, S. Rep. No. 91-403, 90th Cong., 1st Sess. 40 (1967).

30. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253, 255 (D. D. C. 1972); ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW, 1974 at 1077-1080. The Senate committee report on the Air Quality Act emphasized that the Act would apply to all areas of the country, and quoted Senator Muskie for the proposition that it was necessary "to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future." *Air Quality Act of 1967, supra* note 29, at 2-3, 8.

The Act was administered by the National Air Pollution Control Administration of the Department of Health, Education and Welfare, which formalized the concept of nondeterioration in its Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I, § 1.51 at 7 (1969):

> "[A]n explicit purpose of the Act is 'to *protect* and *enhance* the quality of the Nation's air resources' (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law.

See generally, Non-Degradation—Clean Air Act and Amendments Held to Mandate a Policy Prohibiting Significant Deterioration of Air Quality in Areas of Relatively Clean Air, 2 FORDHAM URBAN L. J. 136 (197), (hereinafter *Clean Air Act Held to Prohibit Significant Deterioration); The Clean Air Act and the Concept of Non-Degradation: Sierra Club* v. *Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1971) (hereinafter *The Concept of Non-Degradation*).

In the Senate hearings on the Clean Air Act amendments of 1970, the officials charged with implementation of the 1967 Act expressed their clear understanding that the "protect and enhance" language of Section 101 mandated the policy of non-deterioration. HEW Secretary Robert H. Finch testified as follows in a statement presented by Undersecretary John Veneman:

> In their implementation plans, the States would have to spell out the measures to be taken to achieve and preserve national air quality standards. As I have indicated, they would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so.
>
> As you know, one of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources" * * *. Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision. We shall continue to expect States to maintain air of good quality where it now exists.

Air Pollution—1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). Undersecretary Veneman went on to state that "[i]t will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air even further, even though they may be below national standards." *Id.* at 143.

The Senate committee report gave express recognition to the concept of nondeterioration, directing that

> *[i]n areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.* Once such national

> goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added). Quite to the contrary, however, there was no particular significance ascribed to the "shall approve" language of the section which became Section 110(a)(2). *Id.* at 11-15.

The explanation of this omission in the legislative history appears to be that the 1970 amendments were aimed at states that refused to take action to improve their air quality. The background of the 1970 amendments was described in *Train* v. *NRDC, supra,* 421 U. S. at 64:

> The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970. * * *.

The "stick" was the group of express requirements as to the content of state implementation plans.[31] The "shall approve" language was addressed to the administrative problems that would be caused by a requirement that all states submit complying implementation plans within a limited time; the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans.[32] We have, however, found no indication, nor have we been cited to

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31. "The Committee recognized that because the proposed bill would require a great deal in a short period of time and because the brevity of the provision in existing law has led to uneven and inadequate interpretation, the character of an implementation plan must be specified and the alternative methods of achievement listed. The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

32. *See* note 31 *supra.*

any indication in the legislative history, that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report.[33]

This court has recently cautioned that a failure by Congress expressly to reject the administrative construction of an act need not, without more, indicate congressional acquiescence in the agency interpretation.[34] In *Chisholm* v. *FCC*, ... U. S. App. D. C. ....., ... F. 2d ..... (No. 75-1951, decided April 12, 1976), the court refused to ascribe significance to congressional inaction when it appeared that Congress was "aware" of the administrative interpretation only "in a technical sense." ..... U. S. App. D. C. at ....., ... F. 2d at ....., slip op. at 27. We are not presented with that situation. Not only was the Agency's interpretation of the Air Quality Act of 1967 as mandating prevention of significant deterioration clearly before the Congress in 1970, but the committee reports contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970.

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33. *See The Concept of Non-Degredation, supra* note 30, at 819:

> The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

34. *Chisholm* v. *FCC*, ... U. S. App. D. C. ....., ..., ... F. 2d ....., ..., slip op. at 26 (No. 75-1951, decided April 12, 1976):

> We begin by noting that attributing legal significance to Congressional inaction is a dangerous business * * *. The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber* v. *Allen*, 396 U. S. 168, 185-86 n. 21 (1969), and "affords the most dubicus foundation for drawing positive inferences," *United States* v. *Price*, 361 U. S. 304, 310-11 (1960) (Harlan, J.).

This sort of express congressional recognition of the implementing agency's statutory construction can be extremely significant in interpreting legislative intent. In *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974), for instance, the Court found approval of a long-standing administrative interpretation in Congress' studied inaction:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revice or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

416 U. S. at 274-275. The Court reached similar results in *Zemel* v. *Rusk*, 381 U. S. 1, 11 (1965) (administration of Passport Act of 1926); *C. I. R.* v. *Estate of Noel*, 380 U. S. 678, 682 (1965); *NLRB* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366 (1951); *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 114-225 (1939); and *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 313 (1933), among others.

In the instant case there is every indication that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality. In addition, we find nothing in the legislative history to indicate that Congress had any desire or intention that the 1970 amendments hinder the fight against air pollution by voiding the principle of nondeterioration.

It is significant in this regard that recent congressional statements have supported the historic existence of a requirement of nondeterioration. The report of the House Committee on Interstate and Foreign Commerce on the proposed Clean Air Act Amendments of 1976 (H. R. Rep. No. 94-1175, May 15, 1976) endorses a new statutory definition of nondeterioration, commenting that "[t]he Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101(b) of the Act) that significant deteriora-

tion of clean air must be avoided, and to provide more specific congressional guidance as to how this policy is to be implemented." *Id.* at 83. A contemporaneous report of the Senate Committee on Public Works on similar proposed amendments has both restated the language quoted above from the 1970 Senate report[35] and reaffirmed the continuing policy of nondeterioration:

> A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

Clean Air Amendments of 1976, S. Rep. No. 94-717 at 20 (March 29, 1976). It would fly in the face of overwhelming evidence of legislative intent to hold that the Clean Air Act does not contain a requirement of prevention of significant deterioration.

Our belief that *Sierra Club* v. *Ruckelshaus* was decided properly is bolstered by its acceptance in a number of other circuits.[36] Petitioners suggest, however, that the later decision in *Train* v. *NRDC*, 421 U. S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are necessarily inconsistent with the concept of nondeterioration of air quality. We reject both contentions.

Train v. *NRDC* involved construction of the "shall approve" language of Section 110(a)(3)(A),[37] which requires that the

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35. *See* pp. 21-22 *supra*.

36. *See NRDC* v. *EPA*, 489 F. 2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, sub nom. Train* v. *NRDC*, 421 U. S. 60 (1975); *Big Rivers Electric Corp.* v. *EPA*, 8 ERC 1092 (6th Cir. 1975); *Union Electric Co.* v. *EPA*, 515 F. 2d 206, 220 (8th Cir. 1975), *aff'd on other grounds*, ... U. S. ....., 44 U. S. L. WEEK 5060 (June 25, 1976); *NRDC* v. *EPA*, 507 F. 2d 905, 913 (9th Cir. 1974). *Cf. Highland Park* v. *Train*, 519 F. 2d 681, 685 (7th Cir. 1975).

37. "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he deter-

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Administrator approve revisions of state plans which, after revision, meet the criteria of Section 110(a)(2). The Court held that state action which grants a variance to an individual pollution source must be approved by the Administrator if the approval will not expand the time for compliance with national primary ambient air quality standards[38] or otherwise violate the requirements of Section 110(a)(2). In the following passage, strongly pressed upon us by petitioners, the Court emphasized the mandatory language of Section 110(a)(2):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of

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mines that it meets the requirements of paragraph 2 [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." Section 110(a)(3)(A), 42 U. S. C. § 1857c-5(a)(3)(A) (Supp. IV 1974).

38. Section 110(a)(2)(A), 42 U. S. C. § 1857c-5(a)(2)(A) (1970):

> The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained[.]

> § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

421 U. S. at 79 (emphasis in original).[39] It is argued that this decision removes from the Administrator the discretion to disapprove a plan which complies with Section 110(a)(2), and therefore requires that *Sierra Club* v. *Ruckelshaus* be overturned. This argument, however, is subject to the same analysis by which we reject the argument based on Section 110(a)(2) alone. Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of nondeterioration, even though the decision below was based in part on *Sierra Club* v. *Ruckleshaus*.[40] Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club*, we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train*.

In another recent decision, *Union Electric Co.* v. *EPA*, ... U. S. ....., 44 U. S. L. WEEK 5060 (June 25, 1976), the Supreme Court found challenges to state implementation plans based on economic infeasibility to be barred by the mandatory nature of Section 110(a)(2). The Court found in the legislative history of the 1970 amendments a congressional determination that clean air objectives should take precedence over claims of economic or technological infeasibility:

> As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what

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39. The language was repeated in *Hancock* v. *Train*, ... U. S. ....., ..., 44 U. S. L. WEEK 4767, 4788 (June 7, 1976) (dictum), which concerned the obligation of federal facilities to comply with the requirements of state implementation plans.

40. *NRDC* v. *EPA*, *supra* note 36, 489 F. 2d at 408. The *Train* decision was limited expressly to the question of approval of variances. 421 U. S. at 69-70.

> was perceived as a serious and otherwise unchecked problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject * * * the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train* v. *NRDC*, 421 U.S., at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.
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> This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological infeasibility.

..... U. S. at ....., 44 U. S. L. WEEK at 5063. Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deterioration of air cleaner than the national standards be prevented.[41] Thus, despite the emphasis placed on (a)(2) by the opinions in *Train* v. *NRDC* and *Union Electric*, we do not believe the result in the instant case is controlled by either opinion.

Petitioners also rely on the Energy Supply and Environmental Coordination Act of 1974 (ESECA), which was enacted to

41. As was the case in *Train* v. *NRDC*, the lower court in *Union Electric* expressly had approved the concept of prevention of significant deterioration. *Union Electric Co.* v. *EPA*, *supra* note 36, 515 F. 2d at 220 n. 39. The Supreme Court affirmed the Court of Appeals without mentioning that issue.

encourage stationary fuel-burning sources to convert from oil to coal, to minimize the nation's dependence on imported oil. Among other thing, it (1) authorized the Federal Energy Administration to require power plants and other major fuel-burning sources to burn coal, (2) amended the Clean Air Act to provide a limited exemption from stationary sources requirements to those converting facilities,[42] and (3) required the Administrator of EPA to review the implementation plan of each state and notify any state which could revise its plan as to stationary fuel-burning sources without violating the national ambient air quality standards.[43] The ESECA is accommodated in the "significant deterioration" regulations by 40 C. F. R. § 52.21(d)(1), which exempts from preconstruction review modifications "to utilize an alternative fuel, or high sulfur content fuel."

Although conversion to "dirtier" fuels such as coal certainly will impair both improvement and maintenance of air quality, there is no reason to believe that passage of ESECA was intended to eliminate the requirement of nondeterioration.[44] The amendment was a necessary response to the nationwide shortage of oil and natural gas, and no reason has been presented for ascribing to it a greater significance.[45]

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42. Section 119, 42 U. S. C. § 1857c-10 (Supp. IV 1974).

43. Section 110(a)(3)(B), 42 U. S. C. § 1857c-5(a)(3)(B) (Supp. VI 1974).

44. The "purpose" section of ESECA, 15 U. S. C. § 791 Supp. IV 1974), is as follows:

> The purposes of this chapter are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, *in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment,* and (2) to provide requirements for reports respecting energy resources.

(Emphasis added.)

45. We also reject the argument that it is "unfair" to count the increased emissions from a source that is converted to coal against the allowable pollution increment for the area, since that modification is exempted from preconstruction review. We see no reason why a state in which major utilities have been forced to convert to coal may not choose to impose commensurately stricter standards on the remainder of the area.

We therefore find no substantial reason to question, under ESECA or *Train*, the continuing validity of *Sierra Club* v. *Ruckleshaus*, and we proceed to the substance of the regulations under review using that decision as our guide.

B. Are the regulations invalid on the ground that only two of the six primary air pollutants are considered?

The regulations provide for control only of particulate matter and sulfur dioxide emissions,[46] whereas the Administrator also has identified carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidents as air pollutants which have an adverse effect on public health or welfare.[47] It is contended that the regulations violate the District Court's order in *Sierra Club* v. *Ruckleshaus* by failing to prevent significant deterioration of air quality with respect to those four pollutants.[48]

EPA has responded that the interrelationships among those four pollutants, and the relationships betwen incremental increases in those pollutants and deterioration of air quality, are poorly understood and cannot be determined with any reasonable degree of accuracy:

> These [four pollutants] are commonly referred to as "automotive pollutants," because the automobile is the major source of each of them * * *. The first three (HC, NO_2, and O_x) are also known as "photochemical" or "reactive" pollutants, because under the influence of sunlight, they enter into a complex chemical reaction in the atmosphere. * * * The rate at which the reaction occurs depends on a number of variables, including temperature, humidity, solar intensity, and the concentrations of the input pullutants. * * *

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46. *See* note 18 *supra*.

47. 40 C. F. R. §§ 50.8-50.11 (1975).

48. The order required that the Administrator "prepare and publish proposed regulations, pursuant to 42 U. S. C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration." *Sierra Club* v. *Ruckelshaus*, Civil Action No. 1031-72 (D. D. C. May 30, 1972).

> The chief reason for excluding photochemical pollutants from these regulations is that the relationship between the emission of HC and oxides of nitrogen, on the one hand, and the resulting ambient levels of the harmful pollutants O_x and NO_2, on the other, is very poorly understood. The only method for relating emissions to air quality for these pollutants is the "area-wide proportional model." This model assumes, as its name suggests, that ambient pollutant levels are proportional to total emissions. The model is useful only in areas where ambient pollutant levels are substantial and well-monitored, as in urban areas with smog problems. * * * But the proportional model cannot be used to regulate air quality deterioration in clean-air areas. This is because the assumptions underlying the model do not hold in clean-air areas, and also because it is not possible to make accurate measurements of ambient levels of photochemical pollutants that are substantially below the levels of the national standards.

Br. for respondent at 32-33 (footnote omitted), *elucidating*, 39 Fed. Reg. 31006 (August 27, 1974); 39 Fed. Reg. 42511 (December 5, 1974); *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality*, U. S. Environmental Protection Agency, Office of Air Quality Planning and Standards (January 1975), at 21-27 (JA 117-123). EPA concluded that existing technology "is inappropriate for analyzing the incremental impact of individual new sources" with respect to the four "automotive pollutants," and that "[a]t this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." 39 Fed. Reg. 42511 (December 5, 1974). EPA further has contended that ongoing programs toward reduction of automotive emissions "are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides."[49]

Petitioners have emphasized that the four omitted pollutants can have extremely adverse effects on public health and welfare, and have noted that they are emitted by stationary sources as well

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49. 39 Fed. Reg. 31006 (Aug. 27, 1974).

as by moving vehicles. Petitioners have not, however, directly clashed with EPA's contention that it does not have technology or modeling techniques rationally to regulate emissions on a case-by-case basis. This is the type of policy decision in which the Agency's developed expertise is heavily implicated, and with which the court will not tamper so long as the decision was rational and based on consideration of the relevant factors. *Ethyl Corp.* v. *EPA*, *supra*, ____ U. S. App. D. C. at ____-____, ____ F. 2d at ____-____, slip op. at 66-74. Given the absence of any direct denials of EPA's assertions on this point, the Agency is entitled to claim the presumption of validity which attends its actions. *Id.*, slip op. at 68. We therefore hold that EPA did not act unlawfully in excluding from its regulations the four "automotive pollutants."

C. Are Class II and Class III invalid as permitting significant deterioration of air quality?

D. Is it unlawful to make determinations as to permissible air quality deterioration on the basis of considerations other than air quality?

It is argued by Sierra Club that Classes II and III, by permitting increases in sulfur dioxide and particulate matter pollution to levels which in some areas may be many times present concentrations, allow significant deterioration of air quality. The "significance" is primarily a matter of the numbers involved; although evidence has been presented that levels of pollution below the national secondary standards may have adverse health effects,[50] it is for the Administrator rather than the courts to determine that the national secondary standards no longer can be said to protect the public from "any known or anticipated adverse effects" of a pollutant. The question of significance thus leads by

50. Br. for petitioners Sierra Club *et al.*, No. 74-2063, at 18-20. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

implication to a second line of argument—that it is unlawful to consider deterioration of air quality "insignificant" simply because it accompanies normal, controlled economic development.

EPA recognized, in developing the concept of "significant deterioration" pursuant to Judge Pratt's order, that "[p]ending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 39 Fed. Reg. 18987 (July 16, 1973). It therefore determined that each state must determine what level of incremental pollution, taking into account the air quality and social and economic needs and objectives of the area, would be "significant deterioration" of its air quality.[51]

In that context, it was a rational policy decision that the significance of deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy. The approach provides a workable definition of significant deterioration which neither stifles necessary economic development nor permits unregulated deterioration to the national standards.[52] We therefore find that EPA acted within the discretion it is granted as to matters of policy[53] in choosing this design to prevent significant deterioration of air quality.

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51. *See* pp. 12-13 *supra*.

52. EPA acknowledges that all states theoretically could reclassify to Class III, thereby permitting unreguiated deterioration to tbe national standards. It asks that the states not "arbitrarily and capriciously" disregard its outlined considerations before redesignating areas. 40 C. F. R. § 52.21(c)(3)(vi)(*a*).

53. However formal the type of agency proceeding, an agency's policy choices are reviewed under the arbitrary and capricious standard, which asks merely whethe rthe policy choice is rationally connected to its factual basis." *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L. J. 1750, 1751 (1975).

We may state our belief, as a general overview at this point, that for the most part it somewhat misses the mark to raise objections to the specific emission limits of the regulations under review. EPA has emphasized that the individual states are free to conceive and adopt their own methods of preventing significant deterioration. A state may use EPA's system to classify itself as industrial-metropolitan (Class III), as anticipating normal economic growth (II), or as desirous of protecting its clean air (I). But it also may develop its own scheme, based on its own needs, so long as the regulatory structure prevents significant deterioration of air cleaner than the national standards. Given the broad power vested in the states to alter or amend these regulations, we find little merit in objections to the specifics of the classification scheme itself.

E. Has the effective date of the regulations been postponed unlawfully beyond the date contemplated by the Clean Air Act?

The Clean Air Act of 1970 imposed a series of time limits for the various steps leading up to approval of state implementation plans. Under that timetable regulations should have become effective by the middle of 1972.[54]

The regulations employ two later effective dates. First, emissions increments are measured from a January 1, 1975 baseline, and all sources for which "approval" is given after that date will

54. The Clean Air Act Amendments of 1970 were added on Dec. 31, 1970, 84 STAT. 1677. The Administrator was given 90 days in which to propose and promulgate national primary and secondary ambient air quality standards. Section 109(a)(1)(B), 42 U. S. C. § 1857c-4(a)(1)(B). The states then were given nine months to submit proposed implementation plans to the Administrator, § 110 (a)(1), 42 U. S. C. § 1857c-5(a)(1), and the Administrator had four months to approve or disapprove the plans. Section 110(a)(2), 42 U. S. C. § 1857c-5(a)(2). The Administrator was to "promptly prepare and publish" implementation plans for states which failed to submit a complying plan or which failed to revise a plan after 60 days notice. Section 110(c), 42 U. S. C. § 1857c-5(c). The target date for effectiveness of state implementation plans was therefore mid-1972.

have their emissions counted against the allowable increment for the region. 40 C. F. R. § 52.21(d)(2)(i) (1975). Second, preconstruction review is provided only for sources which have "not commenced construction or modification prior to June 1, 1975." 40 C. F. R. § 52.21(d)(1) (1975). " 'Commenced' means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." 40 C. F. R. § 52.21(b)(7) (1975). *Compare* 40 C. F. R. § 52.01(b) (1975). All later-commenced source construction must be reviewed for compliance with new source performance standards and for a determination that construction will not cause the pollution increments of any area to be violated. 40 C. F. R. § 52.21(d)(2) (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975).

We are asked to hold that sources for which construction was commenced after mid-1972 must be counted against the allowable pollution increments for the various regions. EPA answers that inclusion of the earlier construction would limit practical use of the regulations to regulate future development. We accept the latter position. Whatever the effect of past construction has been upon present pollution, each state must determine what will be appropriate for future air quality and economic development. So long as any state may choose to limit future development to compensate for excessive past pollution, the choice of starting dates for the applicability of the regulations appears to be irrelevant.[55] For the same reason we do not believe EPA acted unreasonably in failing to count increases in pollution since 1972 against the allowable increments. It was a rational policy decision to limit the instant regulations to prospective concerns only.

55. Similarly, we find no ground for objection to the manner in which EPA has defined commencement of construction. 40 C. F. R. § 52.21(b)(7) (1975). Even if a source on which construction has "commenced" is not subject to preconstruction review, its emissions may be considered in choosing the appropriate pollution increment to be applied to the area.

F. Is it arbitrary and capricious to review proposed construction of stationary sources on the basis of compliance with the New Source Performance Standards, rather than on the basis of Best Available Control Technology on a case-by-case basis?

G. Was the Administrator required to provide for preconstruction review of all sources, rather than for "significant" sources only?

40 C. F. R. § 52.21(d)(ii) (1975) requires that new sources which are subject to preconstruction review meet the level of emissions that would be achieved by application of the Best Available Control Technology (BACT); Section 52.01(f) defines BACT as equivalent to the New Source Performance Standards (NSPS) promulgated under Section 111 of the Clean Air Act, 42 U. S. C. § 1857c-6 (1970), *amended* (Supp. IV 1974), when those standards are available. If no NSPS has been established for a category of sources, preconstruction review of emission reduction systems is done on a case-by-case basis. 40 C. F. R. §§ 52.21(d)(2)(ii), 52.01(f) (1975). The Sierra Club posits that the NSPS guidelines, defined by Section 111 as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," are a "lowest common denominator"-based group and are inconsistent with the policy of nondeterioration.

We accept EPA's response that case-by-case review of all new sources would not only be unworkable, but would undermine Section 111 by limiting its application of NSPS to those areas which have not yet achieved the national secondary standards. It appears, in addition, that application of NSPS rather than BACT will not of necessity lead to more total pollution; a given area still is limited to the specified increment for its classification, and the use of a less effective emission reduction system by one new statutory source will simply use up more of the allowable incre-

ment and limit opportunities for other proposed new sources. This trade-off, between types of control systems and opportunities for new source construction, is best left to the states, which by delegation will administer the preconstruction review. As the Supreme Court held in *Train* v. *NRDC*, *supra*, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U. S. at 79. We therefore hold that the use of NSPS is rational and in accord with the Clean Air Act.

An additional challenge to the procedures for preconstruction review is based on the allegedly unlawful limitation of review to 19 specified categories of sources.[56] We find this argument

56. The 19 listed categories are:

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B. T. U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(ix) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fuel Conversion Plants.

(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

40 C. F. R. § 52.21(d)(1)(i)-(xix) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

subject to the analysis presented above with respect to use of NSPS rather than BACT. Review of every new source of pollution clearly would be impossible since every gas- or oil-heated house is a source of some pollution. The decision to review only those sources which emit more than 25 pounds per hour of sulfur dioxide or particulate matter[57] does not mean there will of necessity be more total pollution; it means only that a large number of minor sources could use up the area's allowable increment and thereby preclude construction of new major sources of pollution. As EPA stated in a document explaining its regulations:

> The 18 categories which are covered by the regulation, except for fuel conversion plants, are the largest present emitters of SO_2 and TSP on a nationwide basis. Fuel conversion plants (coal gasification and liquefication, oil shale processing, etc.) were included due to their significant growth potential, particularly in presently clean areas * * *. The air quality impact of sources not included in the 18 categories is taken into account since the total air quality deterioration above the baseline is taken into account when an application to construct a new source of one of the 18 categories is reviewed.

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U. S. Environmental

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57. The standard of 25 pounds/hour of emissions for addition of new categories to the list of those subject to preconstruction review was proposed on June 9, 1975 (40 Fed. Reg. 24534) and adopted Sept. 10, 1975 (40 Fed. Reg. 42011):

> [T]he criteria the Administrator intends to use in adding further sources in the future * * * are:
>
> (1) a new source performance standard for sulfur dioxide (SO_2) or particulate matter has been established for the source of any facility of the source under Part 60 of this chapter, and (2) the established new source performance standard will allow any anticipated future plant affected by the standard to emit SO_2 or particulate matter in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

The later notice also added the 19th category, Ferroalloy production facilities.

Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 27-28. Further, it is within the power of the various states to enact more stringent controls, and expanded preconstruction review procedures, should limited review lead to problems in regulating incremental pollution. We therefore hold that the regulations are not invalid insofar as provision is made for preconstruction review of only the specified categories of stationary sources.

H. Are the regulations arbitrary and capricious on the ground that the allowable increments are unrelated to anticipated adverse effects on public health and welfare?

The regulations under review establish a classification scheme which is not based on demonstrated adverse air quality effects, but rather on a balancing of concerns with air quality, economic and social needs and objectives, and development of energy sources. The industrial petitioners contend that EPA is not authorized to promulgate regulations which are not related to adverse air quality effects, and that Classes I and II therefore are invalid.

The need to prevent significant deterioration of air cleaner than the national standards, and the statutory authorization therefor, was settled by the *Sierra Club* v. *Ruckelshaus* litigation. It clearly is a rational legislative purpose to protect and enhance the quality of the nation's air, even in the absence of quantified evidence of adverse effects.[58]

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58. EPA emphasized in promulgating regulations that levels of pollution below the national standards still may have some adverse effects:

> Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot * * * be based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in possible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials.

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The District Court order in *Sierra Club* v. *Ruckelshaus* mandated that EPA enforce this legislative purpose by preventing significant deterioration of air quality, but left definition of "significant" to the Agency. EPA's solution was a definition created by its own implementation; each state's evlauation of the relative importance of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory requirements based on scientific research, they properly cannot be judged by asking whether the increments are related to demonstrated health effects. As we have noted above, any state could adopt even more stringent regulations by proposing its own revision to its implementation plan.[59]

We therefore find insubstantial the objection that the varying allowable increments presented in the instant regulations are unrelated to demonstrated adverse health effects. The regulations flow from a valid legislative goal, and we believe EPA

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> Since there is no way to relate "significance" of deterioration of air quality to any adverse effects resulting from air quality levels cleaner than the national standards, EPA concluded that the determination of what is "significant" deterioration must take into account factors other than air quality alone. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air."

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U. S. Environmental Protection Agency, Offiee of Air Quality Planning & Standards (January 1975), at 6. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

59. *See* pp. 16-17 *supra*.

has acted reasonably in permitting each state, in its informed discretion, to develop a workable definition of significant deterioration.

I. Are the regulations unworkable because present modeling techniques are inadequate to predict precisely how a new source will affect the ambient air?

Some petitioners[60] have objected that present computer modeling technology is inadequate to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increment for a given region. EPA does not dispute the point as to the accuracy of existing techniques, but does argue that present diffusion modeling techniques, "while not corresponding to actual conditions in the ambient air, do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source." 39 Fed. Reg. 31003 (August 27, 1974). So long as the method of measurement is consistent, it may be used as a reliable benchmark of the relative impact of difference sources; EPA argues that it therefore is unnecessary to be able to guarantee with precision what effect a source will have.

We have no basis on which to question EPA's judgment as to its predictive techniques. Any consistent method of prediction can be adjusted in light of actual experience, and a state therefore may adjust its guidelines for future development on the basis of changes in the measured pollution levels over time. We cannot hold at this time, therefore, that lack of precision alone is a substantial objection to the methods which may be used to estimate the impact of a proposed source on actual levels of pollution.

J. Did EPA violate the Clean Air Act

(1) by not permitting submission of revised plans before promulgating regulations, or

(2) by not holding hearings in each state before promulgating the regulations?

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60. *See, e.g.*, br. of American Petroleum Institute *et al.* in No. 75-1665 at 38.

The Administrator is required to prepare and publish his own implementation plan, or portion thereof, for a state if (a) the state fails to submit a plan as to any national standard, (b) the plan is not in accordance with the requirements of Section 110 of the Act, or (c) the state fails, within 60 days, to revise its plan pursuant to Section 110(a)(2)(H), which requires that implementation plans provide for revisions (i) to take account of changes in technology or (ii) if the Administrator determines that the plan is inadequate to achieve the primary or secondary standards. Section 110(c)(1), 42 U. S. C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) also contains a hearing requirement; if a state did not hold a public hearing with respect to the plan or revision being promulgated, the Administrator must provide a hearing within the state. The Administrator is to promulgate his regulations within six months, unless within that time the state has adopted and submitted an implementation plan which is in accord with the requirements of Section 110. *Id.*

It is contended that the instant regulations, which amend the implementation plans of all states,[61] constituted a "revision" under Section 110(a)(2)(H). Under Section 110(c)(1)(C) the Administrator may promulgate new regulations only if a state fails, after 60 days, to submit the required (a)(2)(H) revision. Further, if the regulations are considered "revisions," it is claimed, the Administrator was required by Section 110 (c)(1) to hold a hearing in each state before promulgating the regulations.

The original order of the District Court required that the "Administrator * * * prepare and publish proposed regulations, pusuant to 42 U. S. C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order." *Sierra Club* v. *Ruckelshaus*, Civil Action

61. *See* note 9 *supra.*

No. 1031-72 (D. D. C. May 30, 1972). That order—which was affirmed by this court and the Supreme Court—clearly did not contemplate that a hearing be held in each state prior to promulgation of regulations, nor did it require that the states be given a prior opportunity to revise their plans. We reaffirm the order in both respects.

All states had held public hearings on their proposed implementation plans before the District Court order was entered.[62] After disapproving all state plans insofar as they failed to prevent significant deterioration,[63] the Administrator held five regional hearings in Washington, Atlanta, Dallas, Denver, and San Francisco on proposed regulations,[64] and solicited written comments.[65] We believe that procedure was sufficient in the circumstances presented. Unfortunately, the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act. The Administrator's disapproval of all plans pursuant to the District Court order, and the subsequent promulgation of regulations, were required by Section 101 of the Act and by the legislative history, but were not within the defined processes of Section 110(c). Implementation of the District Court order required an exercise of discretion by the Administrator, and we find that he acted well within that discretion by concluding that only regional hearings were necessary to supplement the hearings which had already been held in all states.

In making this decision we wish to emphasize, first, that petitioners have not alleged with any specificity how they were harmed by the lack of individual state hearings. We are pre-

62. In its initial approval and disapproval of state plans, published May 31, 1972 (37 Fed. Reg. 10842), EPA noted that all states had held hearings and had submitted implementation plans.

63. 37 Fed. Reg. 23836 (Nov. 9, 1972).

64. *See* 39 Fed. Reg. 31000 (Aug. 27, 1974).

65. *Id.*

sented only with a generalized statutory claim,[66] which apparently never was raised before the Agency. Second, it should be remembered that the states arguably have been denied no rights by promulgation of the nondeterioration regulations. They remain free, after public hearing, to develop their own regulatory scheme to supplant that promulgated by EPA, so long as the substitute prevents significant deterioration of air quality.[67] We cannot conclude, then, that the regulations are defective on procedural grounds.

K. By providing for reclassification of federal and Indian lands independent of state action, do the regulations abrogate authority granted to the states by the Clean Air Act?

Federal land managers and Indian governing bodies are authorized to propose redesignation of their lands, after consultation with officials of other affected areas and compliance with procedural and hearing requirements. 40 C. F. R. § 52.21(c)(3) (1975).[68] The industrial petitioners and the petitioning state governments object that this authority violates the delegation to the states of authority over air quality within their boundaries in

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66. *Cf. American Airlines, Inc.* v. *CAB*, 123 U. S. App. D. C. 310, 318-319, 359 F. 2d 624, 632-633, *cert. denied*, 385 U. S. 843 (1966):

> [T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. . . .

See also United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33 (1952).

67. *See* pp. 16-17, *supra*.

68. *See* pp. 13-14 *supra*.

Section 101(a)(3), 42 U. S. C. § 1857(a)(3),[69] and Section 107(a), 42 U. S. C. § 1857c-2(a),[70] that it contradicts the submission of federal facilities to state regulation in Section 118, 42 U. S. C. § 1857f,[71] and that the authority to redesignate gives these lands tremendous practical power over neighboring areas which might be hindered in their development because of designation of federal or Indian lands as Class I areas.[72]

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69. 42 U. S. C. § 1857(a)(3) (1970):

(a) The Congress finds—

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments[.]

70. 42 U. S. C. § 1857c-2(a) (1970):

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

71. 42 U. S. C. § 1857f (1970):

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so * * *.

* * *

72. *See* 39 Fed. Reg. 42512 (Dec. 5, 1974):

Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends [*sic*] well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. There-

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EPA has responded that federal land managers and Indian governing bodies have an important legal interest in protecting the air quality of their lands, that redesignation may not be proposed without consultation with officials of the affected states,[73] and that the Administrator may disapprove redesignation if arbitrary and capricious disregard of the interests of other affected areas is demonstrated.[74] With regard to submission of federal facilities to state regulation, EPA notes that federal lands may be redesignated only to a more restrictive classification than that applicable to the entire state,[75] and thus cannot contribute to unwanted deterioration of air quality.

We pretermit this question, as we find that the issue is not yet ripe for review.[76] No federal or Indian land has yet been redesig-

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> fore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

73. 40 C. F. R. § 52.21(c)(3)(iv), (v) (1975).

74. 40 C. F. R. § 52.21(c)(3)(vi)(*b*), (*c*) (1975).

75. 40 C. F. R. § 52.21(c)(3)(iv) (1975).

76. *See Toilet Goods Ass'n Inc.* v. *Gardner*, 387 U. S. 158 (1967), in which cosmetic manufacturers had brought a pre-enforcement action to challenge the authority of the Commissioner of Food and Drugs to issue regulations under the Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act. The regulation at issue authorized the Commissioner to suspend certification service to any person who denied the FDA free access to manufacturing information. Although the issue was purely legal, the Court found that, as framed, it was not appropriate for judicial resolution:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be

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nated, and to that extent we cannot be certain how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.

We note that reservation of power to federal land managers and Indian governing bodies should have no effect on present conduct; there appears to be no reason why economic development of any area should be hindered by the possibility that a nearby area may be redesignated in the future to a more restrictive classification. We therefore do not foresee any irreparable injury which may arise from deferral of this question until it arises in a more concrete context.

L. Are the regulations constitutional?

We find the arguments challenging the constitutionality of the nondeterioration regulations to be insubstantial. Regulation of air pollution clearly is within the power of the federal government

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> refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701(a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific section of the Act authorizing such inspections, although this factor is sure to be a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. * * * This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U. S. at 163-164 (emphasis in original).

under the commerce clause,[77] and we can see no basis on which to distinguish deterioration of air cleaner than national standards from pollution in other contexts.[78] Nor do we agree that the regulations bear no rational relationship to protection of public health and welfare and therefore violate the due process clause of the Fifth Amendment. There is a rational relationship between air quality deterioration and the public health and welfare,[79] and there is a proper legislative purpose[80] in prevention of significant deterioration of air quality. Neither can the regulations be construed as an unconstitutional "taking" under the Fifth Amendment, any more than existing emission control regulations represent such a "taking."[81] The use of private land certainly is limited,

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77. *See District of Columbia* v. *Train*, 172 U. S. App. D. C. 311, 328, 521 F. 2d 971, 988 (1975); *Pennsylvania* v. *EPA*, 500 F. 2d 246, 259 (3d Cir. 1974); *South Terminal Corp.* v. *EPA*, 504 F. 2d 646, 677 (1st Cir. 1974).

78. Indeed, the vigorous objections that have been mounted against redesignation of federal lands or Indian lands are based on recognition that a pollution source can have air quality effects over a large area.

79. *See* note 58 *supra*.

80. *See Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258-259 (1964), in which the Court held the Civil Rights Act of 1964 to be a valid exercise of congressional power under the commerce clause, and found the Act not barred by the Fifth Amendment:

> Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. * * *

See also Nebbia v. *New York*, 291 U. S. 502, 537 (1934) (Fourteenth Amendment).

81. *See South Terminal Corp.* v. *EPA*, 504 F. 2d 646, 678 (1st Cir. 1974), in which the court upheld a transportation control plan which mandated a 40% reduction in available off-street parking spaces:

> [T]he Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to

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but the limitation is not so extreme as to represent an appropriation of the land.

The Tenth Amendment is not implicated either by infringement on the reserved powers of the states, *cf. National League of Cities* v. *Usery*, ... U. S. ....., 44 U. S. L. WEEK (June 24, 1976), or by any requirement of affirmative action, as in *District of Columbia* v. *Train*, 172 U. S. App. D. C. 311, 521 F. 2d 971 (1975). The states retain broad discretion under the regulations to control the use of their land and the scope of their economic development, and are required to take no affirmative action. Preconstruction review under the regulations is conducted by the Administrator unless a state requests that responsibility be delegated to it. 40 C. F. R. § 52.21(d), (f) (1975).

Last, we find no merit to the argument that the congressional delegation of authority to EPA is unconstitutionally vague. There is substantial basis for the instant regulations in both the Clean Air Act and its legislative history, and we find the regulations to be a reasonable means of implementing the congressional intent.[82] *See South Terminal Corp.* v. *EPA*, 504 F. 2d 646, 676-677 (1st Cir. 1974).

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> the owner. The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner.
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> * * *

82. In *Lichter* v. *United States*, 334 U. S. 742, 785 (1947), the Court upheld a congressional grant of authority to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to renegotiate contracts and to recover "excessive profits." The Court applied the following reasoning to the claim that the term "excessive profits" was unconstitutionally vague:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy

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VI. Conclusion

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration" regulations.[83] Our review of *Sierra Club* v. *Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the nondeterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

Affirmed.

Circuit Judge Wilkey concurs in the result only.

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> to infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co.* v. *United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 104. • • •

83. As noted above, *see* pp. 49-51, we do not decide the question whether reclassification of federal and Indian lands independent of state action may be unlawful.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1975

No. 74-2063

SIERRA CLUB,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents

THE DAYTON POWER & LIGHT CO. ET AL.,

Intervenors

No. 74-2079

SIERRA CLUB ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,

Petitioners

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1369

UTAH POWER & LIGHT COMPANY,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO ENVIRONMENTAL PROTECTION AGENCY,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1372

UTAH INTERNATIONAL, INC.,

Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL.,

Petitioners

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1663

THE DAYTON POWER & LIGHT CO. ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1664

BUCKEYE POWER, INC. ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents

SIERRA CLUB ET AL.,

Intervenors

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1666

ALABAMA POWER COMPANY ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1763

MONTANA POWER COMPANY ET AL.,

Petitioners

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

SIERRA CLUB ET AL.,

Intervenors

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ET AL.,

Petitioners

vs.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents

SIERRA CLUB ET AL.,

Intervenors

Petitions for Review of Regulations Promulgated by the Environmental Protection Agency

Before: WRIGHT, ROBINSON and WILKEY, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on petitions for review of regulations promulgated by the Environmental Protection Agency and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the regulations on review herein are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Dated: August 2, 1976

Opinion for the Court filed by Circuit Judge Wright.

Circuit Judge Wilkey concurs in the result only.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 24, 1975

May 21, 1975

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*

INDIANA-KENTUCKY ELECTRIC CORP., et al., *Petitioners,* vs. U. S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent,* SIERRA CLUB, et al., *Intervenors.*	Petition for Review of an Order of the United States Environmental Protection Agency.

No. 742055

This matter comes before the Court on the following documents:

"MOTION TO TRANSFER AND REQUEST TO EXPEDITE CONSIDERATION OF MOTION TO TRANSFER" filed herein on January 22, 1975 by counsel for the Sierra Club, et al.;

"PETITIONERS' MEMORANDUM IN OPPOSITION TO MOTIONS OF SIERRA CLUB, METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, NEW MEXICO CITIZENS FOR CLEAN AIR AND WATER, AND STEPHEN WINTER FOR LEAVE TO INTERVENE" filed herein on January 29, 1975 by counsel for the petitioner;

"PETITIONERS' MEMORANDUM IN OPPOSITION TO MOTION OF SIERRA CLUB ET AL. TO TRANSFER THIS PROCEEDING TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT" filed herein on January 30, 1975 by counsel for the petitioners;

"MOTION OF PETITIONER INDIANA ELECTRIC UTILITY COMPANIES FOR RECONSIDERATION AND VACATION OF ORDER OF JANUARY 27, 1975, GRANTING MOTION TO INTERVENE" filed herein on January 30, 1975;

"MOTION TO TRANSFER" received herein on February 4, 1975 from counsel for the respondent (also captioned in appeal number 75-1006);

"INTERVENORS' RESPONSE TO PETITIONERS' MEMORANDUM IN OPPOSITION TO MOTION TO TRANSFER" received herein on February 7, 1975 from counsel for Sierra Club, et al.;

"PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO TRANSFER THIS PROCEEDING TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT" filed herein on February 10, 1975 by counsel for the petitioners;

"RESPONSE OF INTERVENORS TO PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO TRANSFER" filed herein on March 3, 1975 by counsel for Sierra Club, et al.; and

The letter from counsel for the intervenors (Sierra Club, et al.), dated March 27, 1975 and received herein on March 31, 1975 bringing to this Court's attention an order of the United States Court of Appeals for the Sixth Circuit dated March 11, 1975. Upon consideration of the foregoing, this Court being fully advised in the premises,

IT IS ORDERED that this petition for review of regulations promulgated by the respondent, United States Environmental Protection Agency, is hereby TRANSFERRED to the United States Court of Appeals for the District of Columbia Circuit.

APPENDIX II

RELEVANT PORTIONS OF THE CLEAN AIR ACT

§§ 101, 107, 108, 109, 110, 111, 113, 116, 302, 304, 307(b)

Findings and Purposes

Sec. 101(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, state, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Air Quality Control Regions

Sec. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) For purposes of developing and carrying out implementation plans under section 110—

(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after such date under subsection (c), shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

Air Quality Criteria and Control Techniques

Sec. 108. (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) (1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with

appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals, representatives of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

National Ambient Air Quality Standards

Sec. 109. (a)(1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary

ambient air quality standard (or any revision thereof) under Section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region with not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standards or the availability of improved or more expe-

ditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources) and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment

of maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within the State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Adminis-

trator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

[PL 93-319, June 24, 1974]

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof,

which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source

(or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Adminis-

trator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceeding under this subsection.

Standards of Performance for New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term 'existing source' means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall

delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Federal Enforcement

Sec. 113.(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation

of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) of this title (relating to new source performance standards), section 112(c) of this title (relating to standards for hazardous emissions), or section 119(g) of this title (relating to energy-related authorities) is in violation of any requirement of section 114 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b).

[PL 93-319, June 22, 1974]

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g)

[PL 92-157, Nov. 18, 1971; PL 93-319, June 22, 1974]

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement or (ii) more than 30 days after having been

notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails to refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), 112(c), or 119(g),

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more then one year or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

[PL 92-157, Nov. 18, 1971; PL 93-319, June 22, 1974]

Retention of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[PL 93-319, June 24, 1974]

Definitions

Sec. 302. When used in this Act—

(a) The term 'Administrator' means the Administrator of the Environmental Protection Agency.

(b) The term 'air pollution control agency' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this Act;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term 'interstate air pollution control agency' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term 'person' includes an individual, corporation, partnership, association, State municipality, and political subdivision of a State.

(f) The term 'municipality' means a city, town, borough, county, parish, district or other public body created by or pursuant to State law.

(g) The term 'air pollutant' means an air pollution agent or combination of such agents.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

CITIZEN SUITS

SEC. 304.(a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator of a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy of the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a)(1)

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which

the violation occurs, and (iii) to any alleged violation of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c)(1)(B) or an order issued by the Administrator pursuant to section 113(a). Notice under this subsection shall be given in such a manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitations or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—

(1) a schedule or timetable of compliance, emision limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

GENERAL PROVISION RELATING TO ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

SEC. 307

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

[PL 93-319, June 24, 1974]

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

APPENDIX III

EPA REGULATIONS ENTITLED "PREVENTION OF SIGNIFICANT AIR QUALITY DETERIORATION" 40 C. F. R. §§ 52.01(d) and (f), 52.21

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 *Definitions.*

• • • • •

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method or operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emision of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel of raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

• • • • •

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means

any emission control device or technique which, is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

2. Section 52.21 is revised by designating the first paragraph (a) and adding paragraphs (b), (c), (d), (e), and (f) to read as follows:

§ 52.21 *Significant deterioration of air quality.*

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is better than the secondary standards. The disapproval applies to all States listed in Subpart B through DDD of this part. Nothing in this section shall invalidate or

otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) The phrase "baseline air quality concentration" refers to both sulfur dioxide and particulate matter and means the sum of ambient concentration levels existing during 1974 and those additional concentrations estimated to result from sources granted approval (pursuant to approved new source review procedures in the plan) for construction or modification but not yet operating prior to January 1, 1975. These concentrations shall be established for all time periods covered by the increments set forth under paragraph (c)(2)(i) of this section and may be measured or estimated. In the case of the maximum three-hour and twenty-four-hour concentrations, only the second highest concentrations should be considered.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection, or installation of an affected facility.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modifica-

tion or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) This paragraph applies to all States listed in Subpart B through DDD of this part, all lands owned by the Federal Government, and Indian Reservations, except those counties or other functionally equivalent areas that pervasively exceed any national ambient air quality standards for sulfur oxides or total suspended particulates and then only with respect to such pollutants. States shall notify the Administrator by June 1, 1975, of those areas which are above the national air quality standards and therefore are exempt from the requirements of this paragraph.

(2) (i) For purpose of this paragraph, areas designated as Class I or Class II shall be limited to the following increases in pollutant concentrations over the baseline air quality concentration:

Area designations

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(3) (i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by

the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(*a*) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(*b*) Other States which may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(*c*) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(*d*) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(*a*) The redesignation is consistent with adjacent State and privately owned land, and

(*b*) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a

proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(*a*) The Federal Land Manager follows procedures equivalant to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(*a*) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust,, with approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(*a*) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (*1*) that the requirements of subdivisions (ii) and (iii) of the subparagraph have not been complied with, *(2)* that the State arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3) (ii) *(d)* of this paragraph, *(3)* that the State has not requested delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(*b*) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*c*) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (2) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*d*) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(*e*) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) This paragraph applies to any new or modified stationary source of a type identified below which will be located in any State listed in Subpart B through DDD of this part, which source has not commenced construction or expansion prior to June 1, 1975. A source which is modified, but does not increase the amount of a pollutant other than sulfur oxides or particulate matter, or is modified to utilize an alternative fuel, or higher sulfur content fuel shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B. T. U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xviii) Fund Conversion Plants.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source, in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in the area where the source will be located nor the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to the baseline air quality; and general commercial, residential, industrial, and other sources of emissions growth not included in the definition of baseline air quality which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by subparagraph (2) of this paragraph, the Administrator shall, as a minimum,

require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since the effective date of this paragraph.

(4) (i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U. S. C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act to the maximum feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1)(i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e)(1)(ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall:

(*a*) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(*b*) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(*c*) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source

will be situated as follows: State and local air pollution control agencies, the chief executive of the city and country; any comprehensive regional land use planning agency; and any State, Federal Land Manager, or Indian Governingg Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months, or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State or local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for land use planning, such Agency shall consult with the appropriate State and local land use planning agency prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii) *(c)* of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for

conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.